In The

Supreme Court of the United States

October Term, 1942 No. 428

O. M. TATE, JR., TRUSTEE IN BANKRUPTCY OF POST AND COMPANY, A CO-PARTNERSHIP CONSISTING OF FRED S. POST, MARY POST WILLIAMS, HELEN POST MORRIS AND MRS. FRANK H. POST, (MARTHA L. POST),
Petitioner

vs.

ROSE McCABE HOOVER,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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O. M. Tate, Jr., Trustee in Bankruptcy of Post and Company, a Co-Partnership Consisting of Fred S. Post, Mary Post Williams, Helen Post Morris and Mrs. Frank H. Post (Martha L. Post),

Petitioner

vs.

Rose McCabe Hoover,

Respondent.

I.

COUNTER-STATEMENT OF THE CASE

The statement of the facts in the case by petitioner is inaccurate, incomplete and misleading, and furthermore, does not reflect the exact questions presented by the lower court. Both federal and non-federal questions were adjudged by the Pennsylvania State Court and the latter questions were sufficiently broad to sustain its judgment.

Petitioner on December 30, 1935, instituted an action in equity in Luzerne County, State of Pennsylvania, seeking to set aside and cancel a deed of conveyance, dated December 1, 1933, and recorded in Luzerne County Recorder's Office on December 6, 1933, given to respondent by her aunt, Martha L. Post, who died January 7, 1935, for

lands in the Borough of West Pittston, Luzerne County, Pa., on the ground that said conveyance, in the language of his Honor, John S. Fine, by whom as Chancellor, said action was tried and adjudicated, "was fraudulent as to creditors".

On November 2, 1911, a partnership known as Post and Company, consisting of Frank H. Post, his son, Fred S. Post, and R. W. Barton, was engaged in business in the City of Knoxville, State of Tennessee. On date last mentioned Frank H. Post died intestate, and left to survive him, his widow and second wife, Martha L. Post, and three children by his first wife, a son, Fred S. Post, and two daughters, Mary Post Williams and Helen Post, then a minor child, now Helen Post Morris. Though the death of Frank H. Post dissolved the partnership the business of the partnership was continued until November 27, 1933. The record does not disclose that the affairs of the partnership had ever been settled nor what became of the interest of R. W. Barton therein; nor does the record disclose whether the continuance of the enterprise after the death of Frank H. Post was for the benefit of the surviving partners and said decedent's estate or whether by agreement the property of the deceased member was to remain subject to the risks of the business and limited to the decedent's interest in the business as it existed at the time of his death. However, on November 27, 1933, three corporation alleged creditors of said alleged partnership, by their attorney (R. 69a), filed in the U. S. District Court for the Eastern District of Tennessee, Northern Division, located at Knoxville, Tennessee, an involuntary petition in Bankruptcy No. 7434 therein (which respondent contended did not aver any act which would constitute an act of bankruptcy) seeking to have said alleged partnership of Post and Company and said Fred S. Post (though no act of bankruptcy was in said petition alleged to have been

committed by him) and they only, adjudged bankrupts. Notwithstanding said petition prayed that service of said petition, with subpoena, be made upon Post and Company and Fred S. Post, no subpoena was ever issued in said involuntary bankruptcy proceedings, and no subpoena or copy of said petition, or any notice of said bankruptcy proceedings, was ever served upon said Martha L. Post individually or otherwise in her lifetime. Neither did she ever enter an appearance in said bankruptcy proceedings by counsel, or otherwise (R. 238a-212a).

Said petition averred that said co-partnership consisted of Fred S. Post, Mary Post Williams, Helen Post Morris and Mrs. Frank H. Post. As above indicated, said petition, (with the exception of said Fred S. Post and then in manner above set forth), did not seek to have the alleged members of said firm adjudged bankrupt as individuals. Admittedly no process or petition with subpoena, or any notice of said bankruptcy proceedings, was ever served upon Martha L. Post individually, or otherwise, and without any semblance of authority Fred S. Post filed an answer for said firm. No petition in bankruptcy was ever filed against Martha L. Post (Mrs. Frank H. Post) seeking to have her adjudged a bankrupt as an individual, and as admitted and averred by petitioner in the bill in equity filed by him (R. 22a) "said Mrs. Frank H. Post (Martha L. Post), an individual, was not adjudicated a bankrupt". Said bankruptcy proceedings were so proceeded in that on December 19, 1933, said firm of Post and Company was adjudged a bankrupt, and the Trustee in Bankruptcy Sam Huffaker having fully administered the estate of said Bankrupt, and his final account as such having been finally approved, he was discharged and the estate and proceedings marked "closed", February 7, 1935 (R. 20a).

On November 9, 1935, more than ten months after the

decease of Martha L. Post, on January 7, 1935, and more than nine months after the discharge of Sam Huffaker as said Trustee in Bankruptcy and the marking of said estate in bankruptcy of said partnership "closed", and after any right or interest said Trustee ever had, if any, in land conveyed to respondent had reverted to her as the grantee thereof from her aunt Martha L. Post on December 1, 1933, said U. S. District Court at Knoxville, Tennessee, without any notice to the personal representative of the estate of said Martha L. Post, or her devisees, or to respondent as devisee and grantee of said land, reopened said bankruptcy estate by an ex parte order upon the petition of petitioner acting as attorney for the Reconstruction Finance Corporation, for purpose, as stated in said order, of bringing into the estate and administering upon any assets not heretofore before the court and properly a part of the bankrupt estate. On November 21, 1935, petitioner was appointed Trustee in Bankruptcy of estate of said firm and later instituted said proceedings in equity on the date and for the purpose hereinbefore described. To said bill in equity respondent filed her answer denying that said Martha L. Post was ever a member of said partnership of Post and Company, and calling for proof of the alleged membership of Mrs. Post in said partnership, and objected to and denied the averments in said bill in equity as to alleged insolvency of Mrs. Post and as to the transfer to respondent of her property without consideration and to defraud the creditors of said partnership. Respondent in her said answer also challenged petitioner's right to maintain said equity action and the jurisdiction of the said U. S. Bankruptcy Court by reason of the clearly fatally defective character of said involuntary petition in bankruptcy, and denied that petitioner's alleged claim was a lien on the lands so conveyed to her by said Martha L. Post; averred that petitioner was guilty of laches in the

institution of said equity proceedings and that if his claim was ever a lien on lands so conveyed, it had expired and had not been continued, renewed, preserved or retained thereon as provided by law; that no suit had been brought against said Martha L. Post in her lifetime, nor against her personal representative after her death in Luzerne County, Pennsylvania, where land so conveyed was situated; that said U. S. District Court never acquired jurisdiction of said alleged bankruptcy proceedings by reason of the fatally defective character of bankruptcy petition, and that as a result thereof petitioner's appointment as Trustee in Bankruptcy was and is null and void, and that he was and is without authority or right to institute above entitled proceeding; that said proceeding was an attempt to administer and settle the individual estate of said Martha L. Post, deceased; that no notice was given to nor any process served upon said Martha L. Post, in her lifetime, or the personal representative of her estate after her death, of said bankruptcy proceedings; that petitioner's bill of complaint was not filed in good faith and that he did not come into said Court of Equity with clean hands, but at the instance of the law firm of Edgerton & McAfee, of counsel for petitioner, or said law firm's member or representative, James L. Clarke, who respondent, was advised and believed was counsel for estate of Martha L. Post, deceased, for pecuniary speculative purposes, and in order to extract, if possible, from what they contend is a part of estate of said decedent, moneys in the form of counsel fees, and otherwise (R. 58a). Respondent also filed an answer (R. 74a) to an amended bill of complaint of petitioner (R. 88a) setting forth substantially the same defenses under the head of new matter, and many of the questions raised in said answers so filed by respondent were previously set forth by respondent in the preliminary objections filed by her to

petitioner's original bill of complaint, which objections were dismissed (R. 56a-57a).

After hearing before His Honor, John S. Fine, acting as Chancellor, he decreed nisi, and finally for the Court en banc, that respondent surrender up and cancel the deed received by her for premises in question, and account to petitioner for all rents, issues and profits received by her out of said real estate since December 1, 1933. From said Final Decree respondent took an appeal to the Pennsylvania Supreme Court and said Court reversed the Decree of Luzerne County Common Pleas Court, sitting in equity, at the cost of petitioner, on May 27, 1942, and after denial by said Appellate State Court of petitioner's petition for rehearing on June 29, 1942, the latter makes the application for writ of certiorari now before your Honorable Court.

II.

ARGUMENT

In answer to petitioner's application for a writ of certiorari in instant case and the reasons by him set forth in support thereof, the respondent challenges the sufficiency of the petition for said writ and the reasons for granting the same contained therein, for the following reasons, to wit:

1. Because the question involved as presented in said petition is misleading, inaccurate and incomplete and fails to disclose the exact situation as it existed in the Supreme Court of Pennsylvania.

2. Because the question as presented by said petition does not reflect every important element involved therein or having a vital bearing thereon.

3. Because said petition does not aver nor affirmatively disclose that the determination or decision of said case required a decision of the question presented in said petition.

4. Because an examination of the record of said case, particularly that part thereof represented by Opinion of Supreme Court of Pennsylvania, will disclose that the decree or judgment of said Court rests on federal and non-federal grounds, in other words, grounds involving one or more federal questions, and grounds involving one or more purely state questions, and that the grounds independent of the federal question or questions are clearly and completely adequate and sufficient to sustain said decree or judgment.

5. Because the judgment of the State Court must be affirmed where, as here shown by the record, it sustained both of the two defenses to an action heard therein, one presenting federal questions and the other non-federal questions, where either defense was a complete bar and defense to said suit.

6. Because the United States Supreme Court can only look beyond the federal question when that has been decided erroneously and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment or decree, notwithstanding any error in the decision of the federal question.

7. Because, even if the record did not disclose upon which of two grounds the decree or judgment was based, where the ground independent of any federal question is sufficient in itself to sustain State Court judgment, said judgment will be affirmed.

(A)

IS THE QUESTION INVOLVED AS PRESENTED BY PETITION MISLEADING AND DOES IT REFLECT EVERY IMPORTANT ELEMENT INVOLVED THEREIN OR HAVING A VITAL BEARING THEREON AND DISCLOSE THE EXACT SITUATION AS IT EXISTED IN THE SUPREME COURT OF PENNSYLVANIA?

(Reasons 1 and 2, *supra*)

Respondent respectfully contends that the question involved as presented by said petition is misleading, inaccurate and incomplete, does not reflect every important element involved therein or having a vital bearing thereon,

and does not disclose the exact situation as it existed in the Supreme Court of Pennsylvania.

The question as presented by petitioner is (Page 2 of Petition):

> "Whether title to individual real estate of a partner vests in the Trustee in Bankruptcy of the partnership as of the date the petition in bankruptcy is filed against the partnership, so that thereafter said partner cannot convey valid title thereto to a person other than a bona fide purchaser for value without notice?"

Respondent respectfully submits in fairness to the Supreme Court of Pennsylvania that the foregoing question is clearly subject to the points of criticism hereinbefore enumerated, as are the "specifications of errors to be urged" appearing on Page 7 of Petition, because both disregard, if not conceal, among other things, the important elements and conditions existing before, and considered by, said Court as the basis of its decision of any federal question or questions by it passed upon, to wit: that in instant case the involuntary petition in bankruptcy filed against the so-called partnership of Post and Company did not therein seek to have Martha L. Post, alleged partner, adjudged a bankrupt, nor therein aver that as an individual she was insolvent or had committed an act of bankruptcy, and furthermore, as found by the trial court and the Pennsylvania Supreme Court (R. 238a, Opinion of State Supreme Court, 337) "no process or 'petition with subpoena' or any notice of these proceedings was ever served upon Martha L. Post individually, or otherwise", and "she was never adjudged a bankrupt". (R. 22a, Opinion of State Supreme Court, 346)

Said petition for writ of certiorari also entirely disregards the finding of the Supreme Court of Pennsylvania in

effect that the testimony and evidence in the instant case is insufficient to establish the fact that Martha L. Post was a partner and member of the co-partnership of Post and Company as continued after the decease of Frank H. Post, or that she was liable for the debts of said firm, which finding, independent and regardless of any federal question that might have been decided by said Court, constitutes a complete bar and defense to suit of petitioner.

The Supreme Court of Pennsylvania after quoting answers of Helen Post Morris and her brother, Fred S. Post, to interrogatories admitted by trial court as evidence over objections of respondent's counsel, in its opinion (R. 335a-336a) said:

> "The testimony quoted indicates the uncertainty of the nature of this partnership. It does not appear whether the continuance of the enterprise after Post's death was for the benefit of the surviving partners and the decedent's estate or whether by agreement the property of the deceased member was to remain subject to the risks of the business and limited to the decedent's interest in the business as it existed at the time of his death; See Wilcox v. Derickson, 168 Pa. 331, 31 A. 1080. The rights of subsequent creditors are controlled by the terms of the agreement of continuance and not by common law principles of partnership. If the agreement contemplates that the right of subsequent creditors shall be confined to the assets of the continued firm in so far as the decedent's estate is concerned, this intention forms the measure and extent of their rights. Third persons dealing with a continued enterprise are therefore bound to inquire as to the extent of the authority conferred by the continuation agreement, otherwise they extend credit at their own risk. See 1 Rowley, Partnership (1916)

Sec. 594; See also Warner Fuller, 50 Yale Law Journal 210, 20 R. C. L. Sec. 232, P. 995; 20 ed. 806, and the case of Cameron v. Nat'l Surety Co., 272 Fed. 874, 877, where the Circuit Court of Appeals (8th Cir.) held that: * * * Under the law, therefore, it cannot be said that Mary T. Cameron had any interest in the partnership property, *because the affairs of the partnership have never been settled,* and if it should be true that she had an interest in such property, *it would not establish the fact that she was a partner and liable for the debts of the firm.*"

See also *Brew v. Hastings,* 196 Pa. 230; *Allam's Estate,* 199 Pa. 579; *Meadville Savings Bank Estate,* 2 Pa. Sup. Ct. 618.

(B)

DOES THE PETITION AVER OR AFFIRMATIVELY DISCLOSE THAT THE DETERMINATION OR DECISION OF THE CASE REQUIRED A DECISION OF THE QUESTION PRESENTED IN SAID PETITION?

(Question or Reason 3, *supra*)

Respondent respectfully contends that Petition does not aver nor affirmatively disclose that the determination or decision of the case required a decision of the question presented in said petition.

In *Southern Power Company, Petitioner v. North Carolina Public Service Company,* 263 U. S. 508, the Court said inter alia:

> "Heretofore we have pointed out the necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari",

and in *The United States of America, Petitioner v. W. A. McFarland and J. Norris McFarland Co., Partners, Trading as Henry Marcus & Son (No. 157)*, 275 U. S. 485, the Court said per curiam on October 17, 1927:

> "The decision of the case does not require a decision of the questions which are presented in the petition for certiorari, because of which the writ was granted, and the certiorari heretofore granted in this case is, therefore, revoked upon the authority of Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508. * * *"

In *Thomas M. Lynch, et al. Commissioners, State Tax Commission, etc. vs. The People of the State of New York upon the relation of Elizabeth Pierson*, 293 U. S. 52-54, the Court said:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that the decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it".

In *Castillo v. McConnico*, 168 U. S. on page 679 the Court said:

> "To decide the issue as to jurisdiction we will at the outset ascertain whether a Federal question was necessarily involved in the decision of the State Supreme Court. Even though it be that a federal question was decided, nevertheless, if the questions of a purely state character upon which the Supreme Court of Louisiana passed, are completely adequate to sus-

tain the decree by that court rendered, wholly independent of the Federal question, it will result that no Federal issue is presented for review. Egan v. Hart, 165 U. S. 188-191; Powell v. Brunswick County, 150 U. S. 433-441, and authorities therein cited. In Egan v. Hart, 168 U. S. 188, supra, the Court held that the 'Opinion of state court is to be treated as part of the record and it may be examined in order to ascertain the questions presented, as may also be the entire record, if necessary, to throw light on the findings' ".

(C)

WHERE AN EXAMINATION OF THE OPINION OF STATE SUPREME COURT AND THE ENTIRE RECORD DISCLOSES, AS IN INSTANT CASE, THAT SAID COURT SUSTAINED BOTH OF TWO DEFENSES TO AN ACTION HEARD THEREIN, ONE DEFENSE PRESENTING FEDERAL QUESTIONS, AND THE OTHER, NON-FEDERAL QUESTIONS, EITHER DEFENSE BEING A COMPLETE BAR AND DEFENSE TO THE SUIT, THE STATE COURT JUDGMENT MUST BE AFFIRMED

(Reasons 4, 5 and 6, *supra*)

In *Jenkins, Assignee v. Loewenthal & Another*, 110 U. S. 222, the Court said that,

"When the record discloses two defences to an action brought in a State Court, one presenting a federal question, and one presenting no federal question, either of which, if sustained was a complete defense to the suit, and the State Court gave judgement in favor of the defendant on both, and the case is brought

here by writ of error, the Court will affirm the judgment of court below without considering the federal question".

See also:

Hale v. Akers, 132 U. S. 554;
Eustis v. Bolles, 150 U. S. 361;
Farness W. & Co. v. Yang-Tsze Ins. Asso., 242 U. S. 430-461;
Layne & B. Corp v. Western Well Works, 261 U. S. 387;
Baldwin Co. v. R. S. Howard Co., 256 U. S. 35;
Giles v. Teasley Bd. of Registrars, etc., 193 U. S. 146;
Murdock v. Memphis, 20 Wall. 500;
Leathe v. Thomas, 212 U. S. 112;
McLaughlin v. Fowler, 154 U. S. 663;
DeLaussure v. Gaillard, 127 U. S. 216;
New Orleans Water Works v. Louisiana S. R. Co., 125 U. S. 18;
Joseph D. McGoldrick v. Compt. of New York, 309 U. S. 3.

Argument

(D)

"WHERE THE JUDGMENT OF THE STATE COURT RESTS ON TWO GROUNDS, ONE INVOLVING A FEDERAL QUESTION AND THE OTHER NOT, OR IF IT DOES NOT APPEAR UPON WHICH OF TWO GROUNDS THE JUDGMENT WAS BASED, AND THE GROUND INDEPENDENT OF A FEDERAL QUESTION IS SUFFICIENT IN ITSELF TO SUSTAIN IT, THIS COURT WILL NOT TAKE JURISDICTION. AS THE RECORD FAILS TO SHOW JURISDICTION IN THIS COURT, THE WRIT OF CERTIORARI IS DISMISSED AS IMPROVIDENTLY GRANTED."
Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Petitioners vs. People of the State of New York upon the relation of Elizabeth Pierson,
293 U. S. 52-54

(Supporting Reason 7, *supra*)

The question as to whether the testimony and evidence disclosed by the record in instant case was insufficient to establish the fact that Martha L. Post, deceased, was a partner or member of the partnership of Post and Company, in her lifetime, hereinbefore discussed, and so decided in favor of respondent by State Supreme Court, respondent respectfully contends, was a question of a purely state character, and completely adequate to sustain the decree and judgment of the said Court, wholly independent of any Federal question, with the result that no Federal question is presented for review, under the authorities herein cited.

Respondent also respectfully contends that the ques-

tions as to whether the claim of petitioner as an alleged unsecured general creditor of the estate of Martha L. Post, deceased, was a lien on and against the real estate so conveyed to respondent by said decedent in her lifetime, or had lost its lien by reason of petitioner failing to comply with the mandatory provisions and requirements of the Pennsylvania Fiduciary Act of 1917, P. L. 447, as amended by the Act of June 7, 1919, P. L. 412, (See Opinion of State Supreme Court (R. page 350)) were questions of a purely state character and completely adequate when decided, as they were, in favor of respondent, to sustain the decree and judgment of said State Court, wholly independent of any Federal question, with the similar result that no Federal question is presented for review under the authorities herein cited.

For the reasons hereinbefore set forth, as well as other reasons appearing of record, and because the State and Federal Questions considered and decided by the State Supreme Court of Pennsylvania in instant case were rightly decided, respondent respectfully asks that the application of petitioner for a writ of Certiorari to said Court be denied.

Respectfully submitted,

W. L. PACE,
Counsel for Respondent.

Dated October 19, 1942.